

## Chapter 4

# Standards of Proof for Allegations of Corruption in International Arbitration

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### STANDARDS OF PROOF FOR ALLEGATIONS OF CORRUPTION

At present, there is also no single approach for determining which standard of proof should be applied to prove allegations of with corruption.

There are at least most popular approaches<sup>1</sup>:

1. In a number of cases, arbitrators established that a higher standard of proof (i.e. “*clear and convincing evidence*”, “*more likely than not*” or “*beyond reasonable doubts*”) to be applied.
2. In the majority of cases, tribunals proceeded from the premise that the usual standard (“*preponderance of evidence*” or “*balance of probabilities*”) is appropriate.
3. In some cases, on the contrary, arbitrators established a lower standard, i.e. they reached their conclusions about the existence of corruption on the basis of indirect or circumstantial evidence.

As demonstrated below, these standards, based on adversarial model, does not suit well when tribunals face corruption issues in international arbitration.

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### HISTORY OF CREATION OF ADVERSARIAL AND INQUISITORIAL MODELS

In order to understand why countries of continental Europe and common-law countries use different procedural models and different approaches to the standards of proof, one should take a look at the history of development of judiciary system.

In the early Middle ages, criminals were normally punished at the place of the crime.

If they were not caught it the time when the crime was committed, the victim (or the victim’s relative, in the event of the victim’s death) made allegations against the one whom he suspected in committing the crime. Then, the investigation made according to one of the two basic methods.

Under one model the accused had to exonerate himself by swearing a formal oath that he was not guilty. If the accused was able to back up his declaration with the oaths of a sufficient number of neighbors, who, under risk of eternal damnation, confirmed his declaration, the accused was deemed exonerated.

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Under the second model, the court appealed to God to provide the answer by making the accused person undergo an ordeal.

Sometimes the ordeal took the form of a 'trial by battle', under which accuser and accused fought it out, God demonstrating where truth lay by whom He caused to win the fight.<sup>2</sup>

But more commonly the ordeal

took the form of fire or water. In the former, a piece of iron was put into a fire and then in the party's hand; the hand was bound and inspected a few days later: if the burn had festered, God was taken to have decided against the party. The ordeal of cold water required the party to be trussed and lowered into a pond; if he sank, the water was deemed to have 'received him' with God's blessing, and so he was quickly fished out.<sup>3</sup>

Despite the barbaric nature of these procedures, they persisted in Europe for a fairly long time, up until the beginning of the 12th century when the public's trust in them was fundamentally shaken. As a result, in 1215 the Church officially condemned them at the Fourth Lateran Council — and as this meant that priests would no longer administer ordeals, it was not possible after that to use ordeals in criminal justice as the means of determining guilt or innocence.<sup>4</sup> As a result, this system could not work any more, as ordeal served by the Church was the key element of the investigation.

The resulting gap needed to be filled, and this happened in various ways across Western Europe.

In continental Europe, kings adopted the church's system of investigating offences committed by the clergy. This system was also used by the church when investigating instances of heresy.

An investigation of this type involved the creation of a commission of respected individuals to conduct the investigation. It usually took the form of an interrogation of the accused and of the witnesses, recording their statements, and the rendering of a judgment based on the collected evidence.

This was a formal investigation, called "*inquisition*", and it became the basis for development of the formal procedure known nowadays as the "*inquisitorial*" system.

For the time, it was a very progressive procedural model, as judgments were rendered on the basis of the evidence that was collected and examined by the court. The main point of conducting such proceedings was to create a written case that the judges could review. Although there was a prosecutor, active investigation was a function of the court.

The key element in the procedure was the interrogation of the accused, who was required to swear an oath, answer questions, and, in the absence of sufficient evidence of his guilt, had to undergo torture if he maintained his innocence.

In England a different solution was found. A group of citizens in the vicinity of the crime would usually be questioned, and they would be forced to answer under oath the same question that God used to answer via the ordeal: was the accused person guilty or not?

This was the origin of the trial by jury, and, correspondingly, the adversarial procedure, in which the court did not investigate a crime, but instead heard out the accusation against the suspect and decided whether he was guilty of the crime. And although it was believed that the jurors were supposed to try to establish whether or not the accused party actually committed the crime, this did not always happen. Thus, judgments could be rendered in the absence of any evidence at all, and the English defendant risked being convicted on gossip, hunch or simply because the jury wanted to go home<sup>5</sup>.

Due to the unwillingness of jurors to investigate the facts in England the judges eventually started to allow the parties to call witnesses to tell the jury what had happened when the jury did not know the case themselves.<sup>6</sup>

Thus, little by little, juries began to perform functions that are nowadays performed by judges in adversarial proceedings: they resolve the question of the accused party's guilt on the basis of evidence presented by two sides: the prosecution and the defense.

## 3

### CLASSICAL ADVERSARIAL MODEL

The main principles of adversarial proceedings can best be demonstrated by using the classical statue of Femida (Themis)<sup>7</sup>:



PHOTO CREDIT

Normally Femida is depicted as a blindfolded woman holding a scale in one hand and a sword in the other.

The classical image of Femida portrays the essence of the adversarial process: the judge does not know exactly what happened when the dispute arose: this is why Femida is blindfolded.

The judge is not obliged to establish the facts him or herself; their job is to provide the opposing parties an equal chance to present their positions and evidence. This is why Femida is holding a scale, upon which the parties have to place their evidence. The party whose evidence carries more weight shall win, and Femida, personifying the state, punishes the losing party by sword.

It may actually turn out that Femida's punishment of the losing party is unjust, insofar as the party may in fact have been innocent but simply could not produce the evidence (for example, because accused didn't have enough money for a good lawyer). However, this does not change the essence of the process: this party, despite being right, nevertheless loses, as Femida's goal is not to establish the truth in the case (because she is blindfolded), but rather to ensure that the parties get a fair trial.

Thus, the application of the standard "*more likely than not*," or "*balance of probabilities*" is completely logical in private disputes, and boils down to this: the party that has presented more evidence, or whose evidence carries

more weight (clearly there's a reason for using the term '*weight of evidence*'), wins the dispute.

That said, the application of the classical standard of proof is hardly justified in international arbitration cases where the tribunal faces corruption issues, for the following reasons.

*First of all*, the payment of bribes is a criminal offense in all countries of the world. A person engaging in such activity knows this perfectly well, and therefore tries not to leave any evidence of his illegal actions. Thus, a verbal agreement regarding a bribe is never put into writing, and if it is put into writing, it is made in the form of a legitimate transaction. Consequently, a party making allegation of corruption, as a rule, cannot present any written proof.

*Secondly*, such party likewise cannot call on witnesses, because as soon as a witness testifies in international arbitration that he paid a bribe, he can be immediately charged with a criminal offense. Therefore, witnesses who could give a useful testimony to prove corruption, normally refuse to testify by using various excuses, including the right against self-incrimination.

*Thirdly*, arbitrators do not have the tools that are available to state courts and police for the investigation of facts. The police have the right to seize documents and other evidence, to conduct searches, and to interrogate witnesses (who may face criminal charges if they provide false testimony or refuse to testify). State courts also have, as a rule, quite a number of instruments which allow them to forcibly obtain evidence that has been carefully hidden by a party, ranging from 'discovery'; requesting documents from third parties (banks, state authorities and others); summoning witnesses and obtaining their testimonies under oath.

Arbitrators can not force a party to present evidence. If tribunal requests that a party produce certain documents, and the party does not produce them, the arbitrators may draw adverse inference, they may 'punish' the party with arbitral expenses, but they cannot physically obtain these documents. Third parties (for example, banks) who may receive requests from arbitrators are not obligated to provide the arbitrators with anything at all, insofar as they are not bound by the arbitration agreement. On the contrary — banks are required to keep in secret confidential banking information.

In theory, arbitrators in some countries may apply to a state court for assistance in obtaining evidence, but in practice this happens rather exceptionally.

Thus, when tribunals establish for proving allegation of corruption a standard "balance of probabilities", or even higher standard, they essentially deny the party making allegation of corruption the opportunity to prove it.

#### 4

### **CLEAR AND CONVINCING EVIDENCE?**

"*Clear and convincing evidence*" is the standard of proof generally used in criminal proceedings. In a number of cases this standard was used by arbitrators to prove allegations of corruption.

Thus, in *Dadras v. Iran*, the Arbitral Tribunal held:<sup>8</sup>

**123.** The Tribunal has considered whether the nature of the allegation of forgery is such that it requires the application of a standard of proof greater than the customary civil standard of ‘preponderance of the evidence’. Support for the view that a higher standard is required may be found in American law and English law, both of which apply heightened proof requirements to allegations of fraudulent behavior ..

**124.** The allegations of forgery in these cases seem to the Tribunal to be of a character that requires an enhanced standard of proof.. The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as ‘clear and convincing evidence’, although the Tribunal deems that precise terminology less important than the enhanced proof requirement that it expresses.

However, it seems questionable to use standards of proof that are used in criminal proceedings<sup>9</sup> for international arbitration.

A higher standard of proof is used in in criminal cases for a fairly simple reason: the trial of a civil dispute entails civil law consequences (monetary payments or compulsory performance of obligations), while the criminal case may result in criminal punishment, and the guilty party may be sent to jail, sometimes for the rest of his or her life.

It is precisely for this reason that the law establishes a higher standard of proof (“*clear and convincing evidence*”) for criminal cases.

Insofar as arbitrators do not have the power to send any of the parties or their representatives to jail, the application of a higher standard of proof in international arbitration is completely unjustified.<sup>10</sup>

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### INQUISITORIAL MODEL AND “INNER CONVICTION”

As explained above, the inquisitorial model, predominant in the countries of continental Europe, presupposes the active role of the judge in “*finding the truth*”, or establishment of facts of the case.



PHOTO CREDIT

This is vividly illustrated by the statue of Femida at the Nante Cathedral in France.

In contrast to the adversarial Femida, inquisitorial Femida is not blindfolded. Surely a judge whose duty it is to establish facts cannot be blind.

But there are other features that distinguish the inquisitorial Femida from the adversarial one: as soon as evidence could be introduced to the case not only by the parties, but by the judge as well, the scale became

less important. The basis for a judgment is not only evidence put by the parties on the scale, but the judge’s wisdom and knowledge, symbolized by the book Femida is holding.

But if the evidence in the case is provided not only by the parties, but also by Femida herself, what then happens with classical standard of proof, i.e. “balance of probabilities”? On whose side of the scale should

Femida put the evidence that she herself has discovered? The prosecution's side, or the defendant's?

There is no direct answer to this question in the inquisitorial model. This is why the term "balance of probabilities" is not used in the procedural legislation of civil-law countries. Continental model refers to "the inner conviction of the judge," as the standard to be applied by the judge when resolving cases, which is more appropriate, taking into account inquisitorial approach.

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## WHICH STANDARD SHOULD BE APPLIED TO ALLEGATIONS OF CORRUPTION IN INTERNATIONAL ARBITRATION?

But let's go back to arbitration, which has always been considered a private, contractual matter between the parties, hence the belief that the classic adversarial process (and, correspondingly, the "balance of probabilities" standard of proof) is most consistent with the principles of international arbitration.

That said, international arbitration has long ago ceased to be a private matter.

Although historically tribunal was not required to apply the law on its own initiative and a principle *jura novit curia* was considered as inappropriate in international arbitration cases. However, this solid approach was cracked several decades ago, where it was considered it was a tribunal's duty to apply provisions of European antimonopoly regulations even in the cases when neither parties referred to them.

Moreover, failure to apply super-mandatory provisions of European competition law began to be seen as grounds for setting aside an arbitral award or refusal to enforce it.<sup>11</sup>

Thus, to continue the analogy with the statue of Femida, another figure should be added to the modern arbitration procedure — a kind of supervisor, standing behind Femida and grabbing her sword every time she fails to apply the super-mandatory rules.

What happens in such case with the scale, i.e. the burden of proof?

Let's suppose that the parties entered into a cartel agreement to fix monopoly prices, in violation of European competition laws. Let's also suppose that this contract provides for sanctions against members of the cartel that fail to adhere to these "rules of the game." Let's say one of the cartel members has broken these rules, and the leader of the cartel, in accordance with the arbitration clause, applies to an arbitration tribunal with a claim against the renegade in order to make him pay a fine for the breach. And none of the parties refers to European competition laws as a ground for invalidity of the contract, but instead they build a legal position solely over the issue of whether there was a breach of the obligations under the cartel agreement.

Should Femida, in this case, open her eyes and ask the parties, "What do you think about the fact that this agreement is invalid under the norms of the European competition laws?"

And what will happen with the balancing scale (i.e. the burden and standard of proof), if both sides say, "We don't see any violation here," but Femida is

convinced that a violation does indeed exist, and that its existence is obvious?

The only logical conclusion in a situation such as this is that the classical approach of the adversarial system, with its distribution of the burden of proof on the parties and a “balance of probabilities” standard of proof should not be applied in situations when the arbitrators decide *sua sponte* to raise issues of the public interest.

In this case the most appropriate standard of proof will be neither of the standards mentioned above, as they would be nothing to be put on the scale. The only appropriate standard would be evaluation of evidence based on “inner conviction” of the tribunal, regardless of all the ambiguity and subjectivity of this approach.

It seems that this approach is the most appropriate in arbitration cases where arbitrators are to deal with the issues of corruption.

No one doubts that matters involving combating corruption are in the sphere of public policy, and international public policy as well. Therefore, arbitrators have a duty to prevent using arbitration as an instrument for facilitating corrupt transactions or enforce the contracts obtained by corrupted means.

With this in mind, arbitrators should, on their own initiative and whenever sufficient *prima facie* grounds exist, raise *sua sponte* the issues of corruption.<sup>12</sup> If sufficient evidence exist (based on their inner convictions of the arbitrators), regardless of whether such evidence was provided by the parties independently or obtained as a result of an initiative by the arbitrators themselves, the arbitrators should take the appropriate decision.

## NOTES

- 1 A. Crivellaro, “Arbitration case law on bribery: Issues of arbitrability, contract validity, merits and evidence”, Dossier of the ICC Institute of World Business Law: Arbitration — Money Laundering, Corruption and Fraud, 2003, p.116.
- 2 M. Delmas-Marty, John R. Spencer, *European Criminal Procedures* (Cambridge; Cambridge University Press , 2002). p. 6
- 3 J. H. Baker, *Introduction to English Legal History*, 3rd ed. (London, 1990), p. 5.
- 4 M. Delmas-Marty, John R. Spencer, *European Criminal Procedures* (Cambridge; Cambridge University Press , 2002), p. 7
- 5 M. Delmas-Marty, John R. Spencer, *European Criminal Procedures* (Cambridge; Cambridge University Press , 2002), p. 8
- 6 M. Delmas-Marty, John R. Spencer, *European Criminal Procedures* (Cambridge; Cambridge University Press , 2002), p. 8
- 7 Femida Statue at the Legislative Council Building, Hong Kong.
- 8 Dadras International, et al. and The Islamic Republic of Iran, et al., Award No. 567-213/215-3 (7 Nov. 1995), reprinted in 31 *Iran-U.S. C.T.R.* 127, 135-36
- 9 The application of a higher standard of proof in private disputes most likely arose due to the influence of US traditions, where the Federal Rules of Evidence (establishing for some cases a higher standard of proof) are applicable both in private disputes and in criminal proceedings. As a result, several tribunals applied standards that were intended for criminal cases when resolving allegations of corruption in arbitration proceedings.

- 10 See also M. Wirth, "Production of Documents and Fraud in International Arbitration", *Dossier of the ICC Institute of World Business Law: Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, 2009, p. 182
- 11 In *Marketing Displays International Inc. v. VR Van Raalte Reclame B.V.*, the Court of Appeal of The Hague upheld a lower court's refusal to grant exequatur to three US arbitral awards, because the awards were considered incompatible with Article 81 of the EC Treaty and thus violated public policy. *ICCA YB, Court Decisions 2006*, Vol. XXXI, 808.
- 12 See more on this topic — Vladimir Khvalei, *Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption*, *ICC International Court of Arbitration Bulletin 15*, Vol 24/Special Supplement — 2013.